United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1423

To be argued by
MARC MARMARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1423

In the Matter

of

the Grand Jury Subpoenas Served upon
ANDRES ROSADO, JULIO ROSADO and
LUIS ROSADO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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FOR THE SECOND CIRCUIT

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the Grand Jury Subpoenas Served upon
ANDRES ROSADO, JULIO ROSADO and LUIS ROSADO

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Andres Rosado, Julio Rosado and Luis Rosado (the "Rosados") appeal from an order entered on September 27, 1977, in the United States District Court for the Southern District of New York, by the Honorable Richard Owen, United States District Judge, denying the Rosados' motion (1) to vacate Judge Owen's order of August 22, 1977 holding them in civil contempt pursuant to 28 U.S.C. § 1826 and (2) for a hearing on their claim that they were the subject of illegal electronic surveillance.

Statement of Facts

A. Introduction

At about lunch hour on January 25, 1975, a bomb exploded in Fraunces Tavern in downtown New York City killing four persons and injuring 53 others. The responsibility for this bombing was later claimed in a communique by a group called the Fuerzas Armadas de

Liberacion Nacional Puertorriquena, which is better known by its acronym, FALN.

In April 1975, a grand jury was impaneled in the Southern District of New York to investigate, among other things, the Fraunces Tavern bombing and several other terrorist bombings for which the FALN had also claimed responsibility. During the term of that grand jury, numerous other terrorist bombings occurred in New York, as well as in Chicago and Washington, D.C. The April 1975 grand jury term expired on October 28, 1976.* Just six days later, police officers and agents of the Federal Bureau of Investigation ("FBI") discovered a "bomb factory" in a Chicago apartment that also contained documents and papers linking the bombing paraphernalia—including dynamite, various explosive chemicals, blasting caps, detonator cords, propane tanks, timing devices, batteries—to the FALN and, more particularly, to one Carlos Alberto Torres, the owner of the apartment.** Among the other items found in the apartment was a letter dated February 3, 1975, to Maria Cueto, Executive Director of the National Commission on His-

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* The expiration of the grand jury resulted in the release of Lureida Torres, a witness before the grand jury who on May 13, 1976, was found in civil contempt as a recalcitrant witness by the Honorable Charles L. Brieant, Jr., United States District Judge. That order was affirmed by this Court on the opinion below. *United States* v. *Torres*, Dkt. No. 76-1226 (2d Cir. June 10, 1976), *aff'g opinion below* (76 Cr. Misc. 11-188).

** On September 7, 1977 Torres and one Oscar Lopez, both of whom are fugitives, were indicted by a federal grand jury in Chicago on charges of conspiracy and illegal possession and transportation of explosives in connection with FALN-related activities. Five days later, on September 12, in the Southern District of New York, Torres' wife, Marie Haydee Beltran Torres, was indicted for a violation of 18 U.S.C. § 844(i), in connection with the bombing of the Mobil Oil Building in Manhattan. See page 11, *infra*.

panic Affairs of the Protestant Church from a church in San Antonio, Texas.

Law enforcement personnel immediately made efforts to locate Torres after discovery of the "bomb factory," and arrest warrants were subsequently issued for Torres charging him with unlawful possession of an explosive device and unlawful flight to avoid prosecution. As part of their search for Torres, agents of the New York Office of the FBI sought on November 8, 1976, to interview Maria Cueto and her secretary, Raisa Nemikin, with respect to their knowledge of Torres. Both Cueto and Nemikin stated that both Carlos Alberto Torres and a close associate, Oscar Lopez, who was also being sought by the FBI, were members of the Commission, and Miss Cueto identified a photograph of Torres and reported that she had last been in New York on October 26, 1976, just one week before the discovery of the "bomb factory" in Chicago.

B. The Cueto and Nemikin Subpoenas

A second grand jury was impaneled on November 9, 1976, to continue the investigation commenced by the grand jury that had expired October 28, 1976. This new grand jury issued subpoenas to Miss Cueto and Miss Nemikin, both of whom moved to quash, and upon the denial of their motions by Judge Pierce, *In the Matter of Wood*, 430 F. Supp. 41 (S.D.N.Y. 1977), both women were ordered to testify.

Cueto and Nemikin were granted immunity pursuant to 18 U.S.C. §§ 6002 and 6003 upon their respective invocations of their Fifth Amendment privilege against self-incrimination. Before the grand jury on February 18, 1977, Miss Nemikin refused to answer the three following questions:

(1) "Miss Nemikin, when did you last speak or otherwise communicate with Carlos Torres?"

(2) "Miss Nemikin, I will ask you to please identify all funds, monies of the National Commission on Hispanic Affairs to the Protestant Episcopal Church of the United States, which were directed, openly or in secret, to the FALN, in whole or in part, indirectly or directly, and I include in that question all monies which were directed to any member of the FALN?"

(3) "Miss Nemikin, I will ask you please to identify to the Grand Jury any person (*sic*) whom you know who are involved or have claimed responsibility for the dynamite bombing of Fraunces Tavern on January 24th, resulting in the death of four persons."

Miss Cueto, in her appearance two weeks later on March 4, 1977, refused to answer the three following questions:

(1) "Do you have any knowledge now about the whereabouts of Carlos Alberto Torres?"

(2) "Miss Cueto, did Carlos Alberto Torres play any part in the bombing of Fraunces Tavern here in New York on January 24, 1975?"

(3) "Miss Cueto, this Grand Jury is trying to find out, among other things, who is responsible for the bombing of Fraunces Tavern that killed four people. Can you tell us the names of any person who participated in the bombing or do you have any information at all with respect to it?"

On February 26, 1977, and on March 5, 1977, Nemikin and Cueto, respectively, were held in contempt of court and ordered incarcerated by the Honorable Marvin E. Frankel, United States District Judge, pursuant to 28

U.S.C. § 1826(a). These orders were affirmed by this Court. *In re Maria T. Cueto and Raisa Nemikin, Grand Jury Witnesses*, 554 F.2d 14 (2d Cir. 1977).

C. The Archuleta Subpoena

A day after this Court affirmed the contempt orders of Cueto and Nemikin, a grand jury subpoena was served on Pedro Archuleta commanding Archuleta's appearance to testify on April 4, 1977. On April 4, 1977 Archuleta moved to quash his subpoena on several grounds.*

After two and one-half months of extensive litigation, Archuleta was ordered to testify in the grand jury by the Honorable Charles L. Brieant, United States District Judge, and on June 17, 1977 was asked the following four questions:

> (1) "Did you provide dynamite to anyone you knew to be in a group called FALN at any time prior to January 24, 1975?"
>
> (2) "Do you know the source of the dynamite explosives used at the bombing of Fraunces Tavern?"

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* These were, *inter alia* (1) the Government was harassing Archuleta by hauling him before successive grand juries in different districts, (2) the Government was attempting to circumvent Archuleta's claims of inadequate representation of Hispanic-Americans on the array of the federal grand jury in Chicago before which Archuleta had already refused to testify; (3) that the grand jury in this District was underrepresentative of Hispanic-Americans; and (4) that the grand jury subpoena represented an attempt to restrain the free exercise of Archuleta's First Amendment rights of association and expression and to chill those same rights belonging to unspecified other people. Archuleta subsequently urged two additional reasons in his effort to avoid appearing before the grand jury. These were (1) a New York Times article on April 17, 1977 concerning the investigation of terrorist bombings conducted by the FALN; and (2) electronic surveillance.

(3) "Do you know anyone who was responsible for the bombing at Fraunces Tavern?"

(4) "In early 1968 did you, yourself, steal any dynamite from the Heron Dam Project site near Parkview, New Mexico?"

In response, Archuleta invoked, *inter alia*, his Fifth Amendment privilege, and on June 17, 1977 was granted immunity pursuant to 18 U.S.C. §§ 6002 and 6003. Notwithstanding the immunity order, Archuleta refused to answer the same four questions put to him prior to his invocation of his Fifth Amendment privilege.

As a result of his continued refusal to answer these questions, Archuleta was ultimately held in contempt on June 30, 1977 by the Honorable Richard Owen, United States District Judge, pursuant to 28 U.S.C. §§ 1826(a) and ordered confined as a civil contemnor.

Judge Owen's contempt order was affirmed by this Court on July 22, 1977, with an opinion filed on August 19, 1977. *In re Archuleta*, Dkt. No. 77-1286 (2d Cir., July 19, 1977, opinion August 19, 1977).

D. The Rosados' Subpoenas

Shortly after this Court's affirmance in *Archuleta*, grand jury subpoenas were served upon the Rosados, commanding their appearance on August 17, 1977 concerning violations of Title 18, United States Code, Sections 371, 841 *et seq.* and 921 *et seq.*, which relate to conspiracy, the importation, manufacture, distribution, and storage of explosive materials; and the importation, manufacture and transportation of firearms, explosives and incendiary devices, respectively. The subpoenas also placed the Rosados on notice that they would be directed

to provide fingerprints, palmprints, photographs, handwriting exemplars and voice exemplars.

1. The Request For an Adjournment

On August 16, 1977, William A. Kunstler, Esq., appeared before Judge Owen, on behalf of all three Rosados to seek an adjournment of the grand jury subpoenas until August 24, or in the alternative, August 22. Mr. Kunstler informed Judge Owen that the Rosados had previously been represented by Jesse Berman, Esq. and that Mr. Berman was on a camping trip in Guatemala and could not be reached. Mr. Kunstler added:

"They [the Rosados] asked me to represent them until Jesse Berman came back, which would be about the 26th or the 28th of August. I told them I would represent them." (Tr. 8/16/77 at 4).*

The Government opposed the Rosados' request for an adjournment, but indicated that the proceedings in the grand jury would be limited to a direction that the Rosados produce fingerprints, palmprints, handwriting and voice exemplars and photographs and that no substantive questions would be asked. (*Id.* at 2-3).

In pressing his application for an adjournment, Mr. Kunstler made clear that the Rosados were not going to provide the requested information in the grand jury and wanted an opportunity to litigate the good faith basis of the investigation. (*Id.* at 6-7). As Mr. Kunstler put it:

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* Reference to hearing and arguments herein are abbreviated by the prefix "Tr." followed by the date of the proceeding, and, in the case of the proceedings on August 22, 1977, by an "a.m." or "p.m." to designate either the morning or afternoon session. References to the Rosados' Appendix are designated by the prefix "App.", and to their Brief on Appeal by the prefix "Br.".

"Mr. Kunstler: I think that Mr. Marmaro knows, because he told me that he had been informed, that they are not going to cooperate, so it is going to be a legal issue.

Mr. Marmaro: And I have told Mr. Kunstler that the Government would move to hold them in contempt.

Mr. Kunstler: Oh, there will be a contempt hearing. If it goes all the way, there may be incarceration. But we want a fighting chance." (*Id.* at 6).

Judge Owen adjourned the subpoenas until August 22, 1977, and directed counsel to bring whatever motions he desired at that time. (*Id.* at 15). As of August 16, 1977, it was clear to everyone that there would be contempt proceedings if the Rosados failed to comply with the grand jury's directives.

2. The Motions to Quash

On August 22, 1977, the Rosados appeared before Judge Owen and moved to quash the grand jury subpoenas which had been adjourned until that day. At the outset of the proceeding, Mr. Kunstler announced that as of that time he was appearing only on behalf of Andres Rosado, and both Julio and Luis Rosado announced they were appearing *pro se*. Despite this fact, a single joint motion to quash the subpoenas was submitted to the court, subscribed to by Mr. Kunstler for Andres Rosado, and by Julio and Luis Rosado, *pro se*.

The grounds asserted for quashing the subpoenas were that: (1) the subpoenas were intended to stop the work of the National Committee Against Grand Jury Repression; (2) the subpoenas were intended "as part of a

broad plan of repression against the Puerto Rican independence movement;" (3) the subpoenas were part of a two-year Government program to force the Rosados into becoming perjurious informants; (4) the subpoenas were in violation of international law since they were "a punitive step in repressing [the Rosados'] participation in the education of the American people about the repressive programs of the United States intelligence agencies" and (5) the subpoenas were the result of illegal electronic surveillance. (Motion to Quash, dated August 21, 1977).

Judge Owen heard legal argument from Mr. Kunstler and Julio and Luis Rosado. The thrust of the arguments advanced by or on behalf of all three Rosados was that the grand jury investigation was not a legitimate inquiry, but was rather an attempt by the Government to crush the Puerto Rican independence movement, and that the subpoenas were the result of illegal electronic surveillance.*

Since none of the Rosados could supply any facts to support their bald and sweeping assertions of harassment and electronic surveillance, their motions were overruled, and they were ordered by Judge Owen to appear before the grand jury. (Tr. 8/22/77 a.m. at 29-31).**

3. The Grand Jury Appearances

All three Rosados appeared before the grand jury shortly after noon on August 22, and were directed to provide the identifying information of the type which had

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* Mr. Kunstler even went so far as to analogize the grand jury's investigation to the 1934 burning of the Reichstag in Nazi Germany. (Tr. 8/22/77 a.m. at 24).

** Prior to rendering his decision, Judge Owen was forced to clear the courtroom because of a disturbance caused by apparent supporters of the Rosados. (*Id.* at 21-22, 29-30).

been listed on their respective subpoenas. Specifically, each was directed to supply the following: (1) the impressions of all surface areas on the hands; (2) photographs, both straight on and profile; (3) a sample in their handwriting of the words, "City Desk, New York Post, 210 South Street, New York, N.Y." and (4) exemplars of their respective voices talking into a telephone reciting "There will be a message at 14th Street on the subway station. Thank you." (Tr. 8/22/77 p.m. at 13-15, 17-19, 20-22).

After receiving a direction from the foreman of the grand jury to supply this identifying information, each of the witnesses disobeyed and each was ordered to report back to the District Court.*

4. The Contempt Proceedings

Pursuant to the foreman's direction, the Rosados appeared before Judge Owen on the afternoon of August 22, 1977. The entire grand jury was present at that time.

After the Government informed the court that the witnesses had disobeyed the foreman's direction to supply the requested items, the grand jury reporter, Emily Cordes, read the minutes of the refusal into the record. (Tr. 8/22/77 p.m. at 9-23). After this had been done, Judge Owen ordered each Rosado to return to the grand jury and to supply the items which had been previously requested. Each of the Rosados was again separately summoned before the grand jury and each once again refused to supply the four items, this time in clear defiance of Judge Owen's order.

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* During the course of the refusal of the Rosados to comply with the foreman's direction, each brother made a lengthy "political" statement explaining his disobedience. (*Id.* at 9).

The Rosados then appeared for the third time before Judge Owen. At that time the Government moved to hold each of them in civil contempt. In response, Mr. Kunstler, *speaking on behalf of all three Rosados*, sought to justify the refusal to comply with Judge Owen's order on the grounds that the proceedings had been held in violation of the Rosados' rights under the Fourth, Fifth and Sixth Amendments of the Constitution. When Judge Owen reminded Mr. Kunstler that Julio and Luis Rosado were appearing *pro se*, Julio Rosado, *for the first time* stated that he and his brother Luis appeared *pro se* because the Government would not grant an adjournment of the proceedings until Jesse Berman, Esq. returned from vacation. (*Id.* at 24-25). Judge Owen responded by stating "[t]hat matter was not even hinted at before me at any time today, so I am not going to give any weight to that statement." (*Id.* at 25).

Judge Owen then found each of the Rosados in contempt under 28 U.S.C. § 1826 and ordered them confined as civil contemnors until they complied with the court's order or until the life of the grand jury expired.

E. The Indictment of Marie Haydee Betran Torres

On September 12, 1977 the grand jury filed an indictment charging Marie Haydee Beltran Torres with a violation of 18 U.S.C. § 844(i) in connection with the bombing of the Mobil Oil Building on August 3, 1977 in New York City. The responsibility for this bombing, in which one person was killed, was claimed by the FALN.*

The grand jury investigation is continuing.

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* Ms. Torres is the wife of Carlos Alberto Torres, see pages 2-3, *supra*.

F. The Rosados' Motion to Vacate

On September 14, 1977 the Rosados, by way of an order to show cause, moved, *inter alia*, (1) to vacate the August 22, 1977 order of civil contempt and (2) for an order directing the Government to respond to the Rosados' allegations of illegal electronic surveillance and for an evidentiary hearing on those allegations. The Rosados were then represented by Jesse Berman, Esq.

The grounds asserted for the Rosados' motion were (1) that Julio and Luis Rosado were allowed to appear *pro se* without any inquiry by the District Court, (2) that Andres Rosado was denied representation by the attorney of his choice, and (3) that the subpoenas were the result of illegal electronic surveillance. (App. 25).

The Rosados' assertions about electronic surveillance were based on their speculation that there was an illegal wiretap on telephone number 312-235-2801, the home of one Jose Lopez, and that many telephone calls had been made from Julio Rosado's home telephone by all three Rosados to Jose Lopez at that telephone number.* In addition, affidavits submitted by the Rosados contained the suggestion—although not the explicit claim—that the telephones of Jesse Berman and Julio Rosado had also been tapped.

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* On August 17, 1977 the Honorable James B. Parsons, Chief Judge of the United States District Court of the Northern District of Illinois found Jose Lopez and two others in civil contempt for their failure to provide fingerprints, palmprints, photographs, voice exemplars and handwriting exemplars to a federal grand jury in Chicago investigating terrorist bombings by the FALN in that jurisdiction.

Judge Owen permitted the Rosados to file copies of affidavits and photographs submitted to Chief Judge Parsons in Chicago in connection with the Jose Lopez contempt proceeding to be treated as duplicate originals filed in the Southern District of New York, and allowed the Government to file a copy of the transcript of the hearing before Chief Judge Parsons.

G. Judge Owen's Opinion

On September 27, 1977 Judge Owen filed an opinion and order which denied the Rosados' motion to vacate the contempt orders, and found that the contentions of illegal electronic surveillance made by the Rosados were insufficient to trigger a response by the Government.

In his opinion Judge Owen found that as of August 15, 1977 all three Rosados were "fully aware of their right to counsel, the benefits of counsel, and, indeed, they all had counsel". (App. 50). Judge Owen further found that for tactical reasons best known to the Rosados, two of the Rosados decided to appear *pro se* on August 22. Judge Owen observed that while Mr. Kunstler represented Andres Rosado, he spoke on behalf of all three on many occasions and submitted joint papers with the two *pro se* brothers. (App. 50-51). It was only when faced with the threat of immediate incarceration that Julio and Luis Rosado—undoubtedly not anticipating the speed with which the proceedings had progressed—first raised the issue of counsel. As to that request, Judge Owen said: "Having had Mr. Kunstler as counsel of record until that morning and having relinquished him for reasons best known to themselves, such a tactical reversal—to demand counsel—for the apparent purpose of delay cannot be countenanced." (*Id.* at 52).

ARGUMENT

POINT I

The District Court Properly Allowed Julio and Luis Rosado to Proceed Pro Se.

Julio and Luis Rosado contend that the failure of the District Court specifically to advise them of the potential dangers in proceeding *pro se* compels this Court to vacate the judgments of contempt. In pressing this argument, Julio and Luis Rosado contend that such advice was required as a matter of law, and in the absence of any inquiry by the District Court there is "no record upon which to speculate that the *pro se* litigant knew or should have known better." (Br. 19). However, in making their argument, Julio and Luis Rosado have misstated the law in this Circuit and have ignored the substantial record which was before Judge Owen.

This Court has on two occasions rejected invitations to establish a formal requirement that litigants be specifically advised about the benefits of proceeding with counsel and the corresponding perils of proceeding *pro se*. Instead, the Court has looked to the circumstances of the case to determine whether the defendants acted knowingly and voluntarily in proceeding *pro se* and whether specific warnings were necessary.

In *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976), the petitioner Konigsberg discharged his attorney after 12 trial days and proceeded *pro se*. In a federal habeas corpus petition, Konigsberg complained that the state trial judge had failed to make an inquiry into whether he understood the implications of representing himself. Since Konigsberg had been represented by counsel up until that point this Court concluded that "[w]hat-

ever might be the need in other situations, Konigsberg's involvement with the courts was such that there was no need for [the state judge] to explain all this to him." 526 F.2d at 134. Moreover, noting the absolute constitutional right of a litigant to appear *pro se*, the Court said that "a case where a defendant is vehemently asserting his right of self-representation is not truly a case of waiver of a constitutional right; it is a decision to assert one constitutional right instead of another." 526 F.2d at 133-34; *see Faretta* v. *California*, 422 U.S. 806 (1975).*

Similarly, in *United States* v. *Rosenthal*, 470 F.2d 837, 845 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973), a case in which a criminal defendant discharged

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*While the *Faretta* Court stated that an accused should be made aware of the consequences of proceeding *pro se*, 422 U.S. at 825, this statement was purely dicta and was clearly intended to insure that the record adequately established a knowing and intelligent waiver of the right to counsel. *See Johnson* v. *Zerbst*, 304 U.S. 458, 464-65 (1938).

This Court's decision in *United States ex rel. Konigsberg* v. *Vincent*, *supra*, was rendered after *Faretta*, and it is clear that the Court felt bound by the Supreme Court's decision in *Faretta*. Thus, Judge Feinberg stated:

> "Had Justice Gellinoff [the state judge] refused to allow Konigsberg to represent himself, there would doubtless have been a claim of error, persuasively fortified by the Supreme Court's recent decision in *Faretta* v *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed. 2d 562 (1975), raising to a constitutional level the right to appear *pro se*. A criminal trial is not an obstacle course for the judge. While it would have been better if Justice Gellinoff had given Konsigberg "explicit warning and advice' when Konigsberg decided to represent himself, under all the circumstances the judge's failure to do so did not amount to constitutional error." 526 F.2d at 134.

On the record in this case the Supreme Court's concern that a litigant realize the consequences of proceeding *pro se* and knowingly and intelligently waive his right to counsel, has been fully met.

his attorney shortly before trial and proceeded *pro se*, this Court concluded that the factual background of the case was sufficient to conclude that the defendant had knowingly and intelligently waived the right to counsel. *Cf. United States ex rel. Martinez* v. *Thomas*, 526 F.2d 750, 756 (2d Cir. 1975), cited without further explanation by the Rosados, where this Court reversed the denial of a writ of habeas corpus in a case involving a *pro se* litigant who had been certified as "a mental defective and undifferentiated moron with an I.Q. of 63 . . ." but based its decision "on the totality and relationship *inter se* of all the circumstances . . ." and not on the absence of an inquiry by the state judge; *see also United States* v. *Warledo*, 557 F.2d 721, 727 (10th Cir. 1977); *Maynard* v. *Meachum*, 545 F.2d 273, 277-78 (1st Cir. 1976).

Understandably, Julio and Luis Rosado have failed to cite either *Konigsberg* or *Rosenthal* in their brief, and have instead relied on language in *United States* v. *Harrison*, 451 F.2d 1013, 1015 (2d Cir. 1971), to the effect that specific warnings must be given. In so doing, they have ignored Judge Feinberg's statement in *Konigsberg* that "*Harrison* has been significantly qualified, even as to direct federal appeals, by *United States* v. *Rosenthal*, 470 F.2d 837, 845 (2d Cir. 1972), in which we held that the specific 'factual background' may in some instances excuse the judge's failure to give 'explicit warning and advice' regarding the waiver of counsel." 526 F.2d at 134.

The factual background of the events surrounding the decision of Julio and Luis Rosado to proceed *pro se* are more than sufficient under *Konigsberg* and *Rosenthal* for this Court to conclude that Julio and Luis Rosado did not need to be specifically advised of their right to counsel. Judge Owen, in his careful opinion, found that all three Rosados were well aware of their right to counsel since

all had previously retained Mr. Berman to represent them in connection with the FALN grand jury investigation and all had retained Mr. Kunstler in connection with the proceedings from which they now appeal. (App. 50).*

As Judge Owen put it:

> "Andres and Julio Rosado had had Mr. Berman as their lawyer in connection with the various FALN inquiries since March and May 1976, respectively, and Luis has been represented by Mr. Berman in those matters since January 1977. In his absence, they engaged William Kunstler on August 15 to represent all three of them. As of August 15, they were therefore fully aware of their right to counsel, the benefits of counsel, and, indeed, they all had counsel." (App. 50).*

The factual conclusion by Judge Owen on this issue is amply supported by the record and is certainly not "clearly erroneous." *United States* v. *Cirillo*, 554 F.2d 54, 55 (2d Cir. 1977); *United States* v. *Eucker*, 537 F.2d 718, 719 (2d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1044 (1977); *Zovluck* v. *United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). Consequently, under *United States ex rel. Konigsberg* v. *Vincent*, *supra*, and *United States* v. *Rosenthal*, *supra*, specific warnings were not required.

Moreover, by raising this issue on appeal, Julio and Luis Rosado are attempting to continue the charade in

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*None of the Rosados has ever challenged Mr. Kunstler's assertion to Judge Owen on August 16, 1977 that he represented all three brothers. (Tr. 8/16/77 at 3-4).

*Significantly, Julio and Luis Rosado have never contended by affidavit or otherwise in the District Court proceedings, that they were unaware of their right to counsel or ignorant of the benefits of counsel. Indeed, Julio Rosado clearly indicated to Judge Owen that it was his desire to proceed *pro se* rather than have continued representation from Mr. Kunstler. (Tr. 8/22/77 p.m. at 25).

which they engaged during the District Court proceedings. As a practical matter, in the District Court Mr. Kunstler was clearly acting on behalf of all three Rosados, even though he was counsel "of record" for only Andres Rosado. (App. 50-51).* Thus, in reality, by proceeding *pro se* Julio and Luis Rosado were afforded the best of both worlds: the opportunity to have a well-known lawyer speak for them, without losing the opportunity to make statements in the District Court about their political views.**

It was only as the proceedings in the District Court drew to an end and the prospect of incarceration neared that the Rosados sought to delay the proceedings further

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*As Judge Owen observed, the record is replete with references to Mr. Kunstler "speaking on behalf of all three brothers." (App. 51). For example, at one point during the proceedings on the afternoon of August 22, Mr. Kunstler stated:

> "There is not going to be an immunity grant? Then, Judge, each one of the defendants raises a constitutional right in the grand jury under all the amendments of the Constitution, including the Fifth, and that is where we are at this moment." (Tr. 8/22/77 p.m. at 5).

Moreover, Judge Owen commented that "since all three [Rosados] were obviously united in interest, Mr. Kunstler, speaking for one, was, as a practical matter, speaking for all three." (App. 51).

** In explaining why the subpoenas should be quashed Julio Rosado said:

> Judge, fundamentally what we are maintaining is that the Grand Jury is serving as an extension of the Federal Bureau of Investigation in an attempt to discuss [sic] the just of the Puerto Rican people for national independence. It is a struggle that has been fundamentally recognized and historically has been validated by the recognition conclusively, and that recognition by the United States Government that all people have a right to independence and freedom and colonialism in this day and age is anachronism which represents the most barbaric tendencies of political man." (Tr. 8/22/77 a.m. at 3).

by making a request to have Mr. Berman represent them.* Had Judge Owen acceded to this request, Julio and Luis Rosado would have been allowed to win a greater delay in their grand jury appearances than Mr. Kunstler had initially requested and obtained on their behalf on August 16th. As Judge Owen correctly noted "such a tactical reversal—to demand counsel—for the apparent purpose of delay cannot be countenanced." (App. 52).

In any event, Julio and Luis Rosado have not been prejudiced by their decisions to appear *pro se* since their present attorney-of-choice, Mr. Berman, had an opportunity to present legal arguments to Judge Owen in an attempt to vacate the contempt judgments. Thus, having had counsel argue on their behalf, the Rosados cannot claim that their continued incarceration for contempt results in any way from their decision to proceed, at least initially, *pro se*.

POINT II

Andres Rosado Received The Effective Assistance Of Counsel.

Andres Rosado claims that the civil contempt order should be vacated because he was represented in the District Court by private counsel, whom he now claims was insufficiently familiar with his case to render effective assistance to him. Specifically, Andres Rosado argues that the proceedings should have been adjourned until Jesse Berman, an attorney who previously represented him, returned from vacation.

The baselessness of the present claim is demonstrated first by the fact that at no point prior to his being held in contempt did Andres Rosado ever ask the District Court to adjourn the proceedings until Mr. Berman's re-

* This request was made by Julio Rosado, speaking apparently for himself and his brother Luis. (Tr. 8/22/77 p.m. at 25).

turn.* Instead at all times prior to filing his motion to vacate, Andres Rosado was represented by a nationally prominent attorney, William A. Kunstler, Esq. As far as Judge Owen knew, Andres Rosado was perfectly content with that arrangement.

In attempting now to show that Mr. Kunstler's representation was a misfortune visited on him by the District Court, Andres Rosado complains that Mr. Kunstler did not have enough time adequately to prepare for the proceedings. However, Rosado concedes, as he must, that on August 16, all three Rosados received a six-day adjournment of their appearances. At that time, the Rosados were placed on notice that a failure to comply with the grand jury's direction would lead directly to contempt proceedings.

In addition, the six-day period of adjournment was more than sufficient since the Rosados were told on August 16 that they would not be asked any substantive questions in the grand jury, but would merely be asked to provide fingerprints, palmprints, handwriting and voice exemplars and photographs. None of the requested items was testimonial, and none was privileged. *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. Mara, 410 U.S. 19 (1973).** Thus, as Judge Owen found, all the Rosados received ample notice under *In re*

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* Such a request was made to the Government on Andres Rosado's behalf and was rejected. See affidavit of Marc Marmaro, sworn to on September 16, 1977, at paragraphs 5-6.

** The reluctance of Andres Rosado and his brothers to supply identifying evidence about themselves is only easy to understand if the Rosados fear that the FBI will be able to match these items against physical evidence gathered thus far in the investigation. If this is the case, the Rosados might rationally conclude that incarceration for civil contempt was preferable to indictment for terrorist bombings.

Sadin, 509 F.2d 1252 (2d Cir. 1975), to prepare "a defense to the citation for contempt which everyone knew was inevitable." (App. 51).

Indeed, in arguing that Mr. Kunstler lacked sufficient time to raise all available defenses, appellate counsel fails to mention even one such defense which could have been raised. He makes a similarly barren claim that had he, Jesse Berman, been representing Andres Rosado some "compromise" could have been reached to avoid Rosado's contempt. This assertion is undercut by the fact that from the time that Mr. Berman returned from vacation and resumed his representation of Andres Rosado no such "compromise" has occurred. Rather, Rosado has remained in contempt rather than purge himself, an option that has been continuously available to him.

POINT III

The Rosados' Allegations Concerning Illegal Electronic Surveillance Were Insufficient to Require a Response by the Government.

The Rosados claim that "the facts, affidavits and exhibits" they offered during the September 16, 1977 argument on their motion to vacate were sufficient to require a response by the Government under 18 U.S.C. § 3504. Judge Owen fully considered this matter and correctly concluded that the Rosados' showing was insufficient to trigger the Government's obligation to affirm or deny the existence of a wiretap.

When the Rosados were subpoenaed to appear before the grand jury, they moved to quash their subpoenas asserting that they had been the subject of unlawful electronic surveillance. As the Rosados concede, their allegations of electronic surveillance lacked any supporting affidavits and, consequently, were correctly rejected by

the District Court. Thus, as of the time that they were held in contempt the Rosados had failed to offer any evidence at all on the subject of electronic surveillance.

When the Rosados moved to vacate the contempt judgments on September 16, 1977, they submitted certain affidavits and exhibits, the bulk of which had been filed during contempt proceedings in Chicago concerning witnesses in the FALN inquiry being conducted in that jurisdiction. Although their papers did not specify the telephones which they believed to have been tapped, their allegations suggested that there were wiretaps on telephones belonging to Jose Lopez,* Julio Rosado and Jesse Berman.

In pressing this argument the Rosados seem to have lost sight of the very limited nature of the grand jury proceedings in this case, and have utterly failed to suggest any reason why they believe that the grand jury's request for fingerprints, palmprints, photographs and voice and handwriting exemplars was ". . . based on information derived from illegal electronic surveillance." *United States* v. *Yanagita*, 552 F.2d 940, 943 (2d Cir. 1977). Indeed, the Rosados have conceded both in their District Court papers and in their brief to this Court that Assistant United States Attorneys and Special Agents of the FBI assigned to the FALN investigation have been interested in the Rosados since 1976. (Br. 3-4; App. 27-28). Thus, it is difficult to conceive of how the limited request for physical evidence from individuals known to investigators for over a year can be the result of wiretapping which allegedly occurred in July and August, 1977.

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* Jose Lopez is the brother of Oscar Lopez, who is presently a fugitive from a federal indictment returned against him in Chicago in connection with FALN-related activities. See page 2, *supra*.

Moreover, an examination of the factors alleged by the Rosados show that far from being factual circumstances from which it might be concluded that illegal electronic surveillance had occurred, they are sweeping and fanciful assertions designed for no other purpose than to delay the proceedings of the grand jury. As such they fall far short of meeting the requirement that the Government furnish a response. *See In re Millow*, 529 F.2d 770, 774-75 (2d Cir. 1975); *United States* v. *Tucker*, 526 F.2d 279, 282 (5th Cir.), *cert. denied*, 425 U.S. 558 (1976). *See also United States* v. *See*, 505 F.2d 845, 856 (9th Cir.), *cert. denied*, 420 U.S. 992 (1974).

First, the Rosados have made several allegations in support of their contention that they had placed several telephone calls during July and August 1977 to Jose Lopez and that Lopez' phone had been tapped. In this connection, the Rosados urged upon Judge Owen: (1) photographs which the Rosados claim show an additional wire spliced into phone lines leading to 312-235-2801, Jose Lopez' telephone;* (2) a copy of an anonymous "John Doe" affidavit introduced in Chicago which "expresses" the opinion that the above photographs depict an unauthorized splice and (3) telephone bills from Julio Rosado's telephone indicating calls from his telephone number were made to Lopez' phone number, 312-235-2801, during July and August, 1977, and an affidavit from Joan Lois Rosado, Julio Rosado's wife, that her husband and his brothers had placed calls to Lopez at 312-235-2801 from her home phone.

Since the Rosados' submission on the purported wiretap on Jose Lopez' phone came largely from material submitted in Chicago, Judge Owen properly considered

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*Nothing in any paper, affidavit or exhibit submitted by the Rosados identify exactly what is depicted by these photographs or that they even relate to the Lopez telephone.

the entire record in that proceeding, rather than the small and self-serving portion submitted by the Rosados. The full hearing in Chicago amply demonstrated that the claim that Jose Lopez' telephone had been tapped was false, if not fabricated. At the hearing the movants' claim was based upon the conclusion of a supposed expert (who did not work for the telephone company) that, based on his examination of certain photographs of telephone equipment, there were "extra wires" and "hurried splicing" on the telephone line shown in the photographs. (Tr. of proceedings before Chief Judge Parsons at 15-33). In addition, a photographer testified that he had taken these photographs and that they depicted equipment on a telephone pole in an alley between 2108 and 2112 West Thomas in Chicago.* (*Id.* at 40-43).

In response to this evidence, the Government offered testimony from a telephone company employee with 18 years of service. The expert who had performed "literally hundreds" of examinations of phone lines for suspected wiretaps during his career, examined the site of the alleged wiretap to determine whether any such wiretap existed. Based on his on-the-spot examination, he concluded (1) that the equipment leading to the Lopez phone was in perfect condition, that there were no extra wires or equipment attached to the line and there had been no "hurried" splicing. Moreover, the expert examined the John Doe affidavit which movants had submitted and concluded that the equipment depicted in the diagrams attached to the affidavit did not even connect with the Lopez telephone. (*Id.* at 63-76).

Judge Owen reviewed the entire transcript of the Chicago proceeding and found no justification for chang-

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*On cross-examination by the Government, the photographer admitted to being a convicted felon. (*Id.* at 45-46).

ing the determination made by Chief Judge Parsons that the Lopez telephone had not been tapped.*

The Rosados also suggested that their own phone had been wiretapped. Thus, they urged upon the District Court: (1) the fact that an FBI agent was waiting outside Julio Rosado's apartment on August 3, 1977, and asked his wife when he would return home, and that the door to the apartment had been unlocked, (App. 44-45); (2) the fact that Julio Rosado's wife has experienced mechanical difficulties in her telephone and (3) the fact that the Government wanted to compare the Rosados' voice exemplars with recorded telephone conversations.

Judge Owen correctly determined that these claims did not amount to a sufficient showing. The FBI's inquiries on August 3rd become quite understandable when one remembers that this was the date of the FALN bombing of the Mobil Oil Building, in which one person was killed. As to claimed mechanical difficulties, these have been previously held to be insufficient to trigger a response from the Government. See *In re Archuleta, supra,*

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* The Rosados implicitly criticize Judge Owen for not reviewing Chief Judge Parson's findings. (Br. 25n; App. 55). It ill behooves the Rosados to complain about Judge Owen's decision, since they could hardly have expected Judge Owen to base his decision on the small and self-serving portion of the record which they submitted.

It is clear from the entire record that the evidence on this point offered by the Government in Chicago was of a superior quality to the evidence offered by movants. In Chicago, the Government's evidence came from a telephone company employee with 18 years of service who personally visited the site of the alleged wiretap, whereas the movants relied (1) on a "John Doe" affidavit and (2) testimony of an individual not employed by the telephone company who claimed to have expertise in surveillance from Army experience who did not visit the site of the alleged tap but rather based his opinion on photographs allegedly taken of the site by a convicted felon.

at 5326. Finally, the voice exemplars requested by the grand jury were, as was clear from the words requested, to be used for comparisons with a FALN telephone communique.

The Rosados' last suggestion was that Jesse Berman's telephone might have been tapped. In this connection the Rosados have made the following allegations: (1) that the Rosados were subpoenaed the day after Mr. Berman telephoned his office "and was told there was no activity concerning the Rosados' case," * (Br. 23); (2) a letter from Director Clarence M. Kelly of the FBI stating that, in response to a Freedom of Information Act request, the FBI had documents relating to Mr. Berman, (3) the theft of a safe in Mr. Berman's office on

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* The statement in the Rosados' brief that Mr. Berman telephoned his office "and was told that there was no activity concerning the Rosados' case," is completely misleading. In making this statement, the Rosados rely on an affidavit of Jesse Berman sworn to on September 14, 1977. According to the Berman affidavit Mr. Berman "telephoned to New York City and spoke to Victoria Morgan, Esq., an attorney whom [he] had earlier requested to ascertain if there were any emergency matters at [his] office. In her review of [his] pressing legal matters as of August 11, 1977, there was nothing concerning the Rosados. On the very next day, August 12, 1977, Andres, Julio and Luis Rosado ("the witnesses") were subpoenaed by the bombing investigation grand jury. When [he] next called [his] office on August 25, 1977 from Laredo, Texas, [he] was told that the witnesses had been subpoenaed and that they had been jailed on August 22, 1977." (App. 29).

Moreover, the Rosados do not cite any facts from which one could conclude that the Government would have known that Mr. Berman would not telephone his office again for two weeks. In fact, the prosecutor in charge of this matter first learned that Mr. Berman was on vacation on August 15, 1977, three days after the subpoenas had been served, and left a message that if Mr. Berman called his office he should be told to contact Assistant United States Attorney Marc Marmaro immediately. (See affidavit of Marc Marmaro sworn to on September 16, 1977 at paragraph 5).

August 15, 1977, which contained the personal papers of Pedro Archuleta; and (4) the fact that the Government had nolled a case against another client of Mr. Berman rather than respond to an electronic surveillance motion.

Not only do these allegations fall far short of providing any basis for believing Mr. Berman's phone had been tapped, but the Rosados do not even attempt to argue any nexus between the alleged "wiretapping" of Mr. Berman's telephone and their grand jury subpoenas. *See United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973), cited with approval by this Court in *In re Buscaglia*, 518 F.2d 77, 78 (1975), for a description of what must be alleged for a grand jury witness to make a *prima facie* showing of a wiretap on the telephone of an attorney for the witness.*

In short, none of the allegations of wiretapping approach the minimal standards of alleging a colorable showing based upon factual circumstance which is re-

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* In *Alter*, the Ninth Circuit set the following requirements:

"(1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;

(2) the dates of such suspected surveillance;

(3) the outside dates of representation of the witness by the lawyer during the period of surveillance;

(4) the identity of the person(s), by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and

(5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.

When these elements appear by affidavit or other evidence the Government must affirm or deny illegal surveillance pursuant to 18 U.S.C. § 3504(a)." 482 F.2d at 1026.

Obviously, the Rosados have not come remotely close to satisfying the test.

quired by this Court before a response from the Government under 18 U.S.C. § 3504 is necessary. *See In re Millow, supra.* Instead, the Rosados have attempted to follow the same course as other contemnors in this investigation by seeking to delay the grand jury's work through totally frivolous claims. However, as this Court has recognized, 18 U.S.C. § 3504 was not designed to aid the obstructive behavior of those lawfully summoned before the grand jury. As Judge Lumbard put it:

> "The statute was not intended, however, to transform an investigation by the government into an investigation of the government where claims of illegality lack substantial support. *Accusations of misconduct based on unsupported suspicion or patently frivolous contentions should not be deemed 'claims' sufficient to require any further inquiry and thus delay proceedings of the grand jury.* This conclusion is mandated by the wide latitude historically accorded to grand juries and by the need to avoid delay in grand jury investigations which neither adjudicate guilt or innocence nor proceed in the adversarial tradition of the trial courtroom. . . .
>
> "*Unsupported suspicion and patently frivolous assertions of government misconduct do not constitute a 'claim' under § 3504 sufficient, to trigger the government's obligation to disrupt grand jury proceedings and check thoroughly the applicable agency records.* We know of no authority to the contrary." (emphasis added). 529 F.2d at 744-45.

Judge Owen's conclusion that the Government need not respond to allegations of illegal wiretapping was correct and should be affirmed.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARC MARMARO being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 11th day of November, 1977 he served II copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

JESSE BERMAN
351 Broadway
New York, New York 10013

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borought of Manhattan, City of New York.

Marc Marmaro

Sworn to before me this
11th day of November, 1977
Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979